Supreme Court, U.S.
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No. 93-1538

In The

Supreme Court of the United States

October Term, 1993

KEITH H. GILL,

Petitioner,

vs.

VIDMARK, INC., BAKER & TAYLOR VIDEO, INC., MARK AMIN and BARRY BARNHOLTZ,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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Respondents VIDMARK, INC.[1], BAKER & TAYLOR VIDEO, INC., MARK AMIN and BARRY BARNHOLTZ oppose the Petition for Writ of Certiorari. Petitioner does not, and cannot, show any special or important reason for this Court to review the issue decided against him by the district court, acting within the proper exercise of its power and discretion, and affirmed by the United States Court of Appeals for the Ninth Circuit, that is, that Petitioner commenced and prosecuted the underlying action frivolously and in bad faith.

STATUTES INVOLVED

In addition to the statutes referred to in the Petition, this case involves 28 U.S.C. § 1927, which provides in relevant part that: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

COUNTERSTATEMENT OF THE CASE

The decisions below, reproduced in the Petition's Appendix ("Pet. App."), provide a proper counterstatement of the case, particularly the district court's February 7, 1989 memorandum ("original memorandum") at Pet. App. B-50 to B-58, the district court's September 12, 1991

[1] Vidmark has the following partially owned affiliate: Trimark Interactive, a Delaware corporation.

memorandum *after* remand from the court of appeals ("the *post*-remand memorandum") at Pet. App. B-27 to B-47, and the unpublished court of appeals' decision, affirming the district court's post-remand award, at Pet. App. A-1 to A-18.

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate the existence of "special and important reasons" justifying review of the court of appeals' decision. Supreme Court Rule 10.1.

I.

THE COURT OF APPEALS' DECISION CREATES NO CONFLICT WITH ANY OTHER COURT OR DECISION.

The court of appeals' decision does *not* create any conflict with any decision of this Court, with any court of appeals, or with the highest court of any state, and Petitioner does not claim otherwise. Indeed, as an unpublished memorandum, the court of appeals' decision cannot even be cited as precedent on any issue in any court.

II.

BECAUSE THE DECISION BELOW RESTS ON A SPECIFIC FACTUAL DETERMINATION MADE WITHIN THE DISTRICT COURT'S PROPER EXERCISE OF ITS POWER AND DISCRETION, GRANT OF THE PETITION WILL NOT BE OF PRECEDENTIAL VALUE TO FUTURE LITIGANTS.

The award affirmed by the court of appeals' decision is based on the specific facts determined by the district

court within the proper exercise of its power and discretion. Hence, grant of the Petition would not lead to a decision by this Court that would be of precedential value to any future litigant.

III.

THE QUESTIONS PRESENTED IN THE PETITION WERE NOT RAISED BELOW.

None of the three "Questions Presented" in the Petition was raised by Petitioner below. *See* "Issues to be Raised on Appeal" (¶ I) in Petitioner's January 2, 1992 Civil Appeals Docketing Statement, attached in the Appendix hereto ("Opp. App.") at A-1 to A-8, and Petitioner's "Statement of the Issues Presented" contained in his March 11, 1992 Brief for the Appellant filed with the court of appeals after remand, attached as Opp. App. B-1 to B-4.

Consequently, only two of the ten case "authorities" referenced in the Petition – *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 955 S.Ct. 1612, 44 L.Ed. 2d 141 (1975), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed. 2d 488 (1980) – were cited by Petitioner in his briefs to the court of appeals, and these he cites in his Petition only for general propositions of law irrelevant to the specific facts of this case.

Moreover, by citing the "plain error" doctrine[2] and footnote 19 of the Mississippi reapportionment decision,

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[2] Petitioner miscites the number of the rule to which he wishes to refer (Supreme Court Rule 24.1(a) – there is *no* Rule 30.1(a)). In any event, such rule relates only to whether the Court may allow an *appellant* to argue, *in his Brief on the Merits* (*after* certiorari is granted), a Question not listed in his Petition.

Connor v. Finch, 431 U.S. 407, 52 L.Ed. 2d 465, 97 S.Ct. 1828 (1977) [the Court has "the authority and duty in exceptional circumstances to notice federal court errors to which no exception has been taken"], Petitioner effectively admits that he did *not* preserve these Questions below.

IV.

THE FIRST TWO QUESTIONS PRESENTED IN THE PETITION REST UPON MISSTATEMENTS OF FACT.

The first two Questions Presented in the Petition rest upon complete misstatements of fact.

A. The District Court Did Not Sanction Petitioner For Filing An Appeal.

The district court did *not* sanction Petitioner for filing an appeal,[3] but for commencing and prosecuting the underlying action frivolously and in bad faith.[4] Accordingly, Petitioner's contrary assumption in Question 1 rests on a misstatement of fact.

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[3] The Petition's reliance on *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988), is therefore misplaced. His citation to *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989), which did *not* involve the imposition of sanctions by any court, is inexplicable.

[4] Because the district court properly sanctioned Petitioner for fees and costs incurred by Respondents *at the trial court level* (and *not* at the appellate level), the Petition's references to *Flip Side Productions, Inc. v. JAM Productions, Ltd.*, 843 F.2d 1024, 1037 (7th Cir. 1988) and *A. Hirsch, Inc. v. United States*, 948 F.2d 1240, 1248 n.9 (1991), are unavailing.

B. The District Court Did Not Sanction Petitioner Without Prior Notice And Hearing.

Nor did the district court sanction Petitioner without prior notice and hearing.[5] To the contrary, the district court issued its *original* memorandum decision only *after* noticed motion and full briefing (although Petitioner declined the opportunity given him by the district court to oppose the reasonableness of the amount of Respondents' fees and costs – *see* Pet. App. B-64 to - 66). *See* Clerk's Record ("C.R.") at 81, 82, 83, 85, 87, 88 and 91. This original district court award was reversed *not* because of any inadequacy in the due process given Petitioner regarding the notice or hearing, but only because the court of appeals found improper the district court's reliance on 17 U.S.C. § 505. The court of appeals remanded the matter to the district court to determine whether other bases supported the award. *Neft v. Vidmark, Inc.*, 923 F.2d 746 (9th Cir. 1991).

Likewise, the district court's *post*-remand memorandum – which determined that the award against Petitioner was properly supported by Fed.R.Civ.P. 11 and 28 U.S.C. § 1927 – was issued only *after* noticed motion, full briefing and oral argument. *See* C.R. 107, 108, 109, 110, 111, 112, 115, 116, 117, 118, 119, 120, 121 and 122. In fact, Petitioner even filed *supplemental* opposition papers, written objections to Respondents' proposed findings, and written requests for additional findings, and later moved to amend the findings as entered. *See* C.R. 111, 124, 125,

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[5] *Miranda v. Southern Pacific Trans. Co.*, 710 F.2d 516, 523 (9th Cir. 1983), thus offers Petitioner no assistance.

126, 127, 128 and 129. Indeed, notwithstanding his phrasing of Question 2, Petitioner *admits* that Respondents' "[post-remand] motion provided notice and hearing." Petition at 23. Petitioner's contrary assumption in Question 2 thus misstates the true facts.

V.

THERE IS NO REASON FOR THE COURT TO ACCEPT THE GENERAL SUGGESTION IN THE THIRD QUESTION PRESENTED THAT THE COURT SET FORTH SPECIFIC CRITERIA FOR DETERMINING WHEN AN ACTION IS FRIVOLOUS.

Petitioner's third "Question Presented" merely suggests generally that this Court "set forth specific criteria to guide district courts in the proper identification of frivolous cases . . . " Petition at 17. The district court, however, properly analyzed the issues before it under Fed.R.Civ.P. 11 and 28 U.S.C. § 1927, and determined within its power and discretion that Petitioner commenced and prosecuted the underlying action frivolously and in bad faith by "fail[ing] to conduct a proper inquiry before filing the action," filing "pleadings [that] were not well-grounded in fact or warranted by existing law," and "needlessly increas[ing] the cost of litigation." District court's post-remand memorandum at Pet. App. B-36. The court of appeals agreed. Court of appeals' decision at Pet. App. A-3 to A-11. There is no special or important reason for this Court to reexamine or modify this accepted analysis in response to Petitioner's general and unfocused request that it do so.[6]

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[6] Petitioner excises language from *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C.Cir. 1985) and *Rosen v. N.L.R.B.*, 735

VI.

THE PETITION'S PREVIOUSLY UNRAISED INSINUATION OF RACIAL BIAS IS MERITLESS.

Although not raised specifically in its three "Questions Presented," the Petition insinuates that the decision below may have been based on "subtle racial prejudice." Petition at 16. *See also,* Petition at 7 and 27. Such claim was never even suggested below by Petitioner, much less raised by him, and is, in any event, unsupportable. The race of no party, representative, witness or declarant was ever disclosed to any court, relevant to any decision by any court, or the basis thereof. In fact, all of the individual parties and representatives of the corporate parties appearing in the underlying action, as well as their counsel, are white, and the outcome of that action had no effect on any of the third parties whom Petitioner advises the Court are African-Americans. Such references simply demonstrate Petitioner's desperate attempt to portray the present dispute as something more than it is.

VII.

THE DECISION BELOW IS CORRECT.

The decision below is entirely correct. As the original and post-remand memoranda of the district court, and the court of appeals' decision, demonstrate, Petitioner

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F.2d 564, 570 n.10 (D.C. Cir. 1984), apparently without even reading the cases. The *Rosen* court found that administrative proceedings *complied* with due process; *Urban* enjoined a *pro se* from further litigation absent his fulfillment of specified preconditions. Neither case assists Petitioner.

commenced and prosecuted the underlying action frivolously and in bad faith, as a result of which the district court, pursuant to noticed motion, awarded sanctions under Fed.R.Civ.P. 11 and 28 U.S.C. § 1927. The court of appeals' decision affirmed the district court's proper exercise of its discretion to award such sanctions jointly against plaintiffs *and their counsel*, Petitioner, whose personal actions and failures to act – with regard to both substantive *and* procedural issues – bore primary responsibility for such award. In fact, although Petitioner argued to the district court on *numerous* occasions that he did not commence and prosecute the action frivolously and in bad faith (*see* C.R. 85, 109, 111, 112, 119, 120, 124, 126 and 128), and to two separate panels of the court of appeals, *no* judge at *any* level has *ever* suggested that the district court finding that Petitioner prosecuted the action frivolously and in bad faith was in any way factually unsupported, "clearly erroneous," an "abuse of discretion" or in excess of the court's "power."

VIII.

CONCLUSION.

For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari ought to be denied.

DATED: April 13, 1994.

Respectfully submitted,

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(Counsel of Record)
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A PROFESSIONAL CORPORATION
Attorneys for Respondents
Vidmark, Inc., Baker & Taylor
Video, Inc., Mark Amin and
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APPENDIX A

UNITED STATES COURT
OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 91510
PASADENA, CA 91109-1510

Court of Appeals
Docket Number
91-56471

YOU MUST FILE AN ORIGINAL AND ONE COPY OF THIS FORM WITH THE CLERK OF THIS COURT WITHIN 14 CALENDAR DAYS OF THE DATE THE FORM IS SENT BY THE CLERK. YOU MUST ATTACH TO THE ORIGINAL AND TO THE COPY OF THIS FORM (1) A COPY OF THE JUDGMENT OR ORDER APPEALED FROM, (2) A COPY OF ANY OPINION OR FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE JUDGMENT OR ORDER, AND (3) PROOF OF SERVICE ON OPPOSING COUNSEL.

CIVIL APPEALS DOCKETING STATEMENT

Case Name: HERB NEFT, et al. vs. VIDMARK, INC., et al.

District Court/Agency: U.S. District Court for the Central District Calif.

District Court/Agency Docket No.: /CV88-2136RJK
District Judge: Kelleher

Party filing appeal/petition: Keith H. Gill, One of Plaintiffs' former attorneys.

A. Timeliness of Appeals or Petition for Review or Enforcement:

(1) Date of entry of judgment or order: September 12, 1991; Oct. 28, 1991

(2) Service Date of any post-judgment motion (other than motion for fees and costs) /September 19, 1991

(3) Date of entry of order deciding post-judgment motion: October 28, 1991

(4) Date notice of appeal or petition filed: November 14, 1991

(5) Last day for filing appeal or petition: November 27, 1991

(6) Authority fixing time limit for filing appeal or petition:

Fed. R. App. P. 4(a)(1)X
Fed. R. App. P. 4(a)(4)_
Fed. R. App. P. 4(a)(2)_
Fed. R. App. P. 4(a)(5)_
Fed. R. App. P. 4(a)(3)_
Other_

B. Appeal from District Court:

(1) Is the order appealed from a final order (i.e., does it dispose of the action as to *all* claims by *all* parties? yes

(2) If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment in accordance with Fed. R. Civ. P. 54(b)? N/A

(3) If not final, is the order appealable as the grant or denial of an injunction under 28 U.S.C. § 1292(a)(1)? N/A

(4) If none of the above applies, what is the basis for appellate jurisdiction? N/A

C. Review of Agency Decision:

If the appeal is from an agency decision, what statute or other authority grants this court power to review that decision? N/A

D. Nature of Relief Sought Below

( ) Damages:
Amount sought $_____
Amount granted $_____

( ) Injunctive Relief
( ) preliminary ( ) permanent
( ) granted ( ) denied

( ) Declaratory Relief:
( ) granted ( ) denied

( ) Attorney Fees:
Amount sought $_____
Amount granted $_____

( ) Other (specify)
Sanctions under Rule 11 and 28 U.S.C. sec. 1927

E. Nature of Disposition Below:

( ) Bench Trial
( ) Jury Verdict
( ) Summary Judgment
( ) Grant/Denial of Injuntion
( ) Default Judgment
( ) Agency Order
( ) Dismissal:
( ) Lack of Jurisdiction
( ) Failure to State a Claim
( ) Failure to Prosecute
( ) Other _____

(X) Other sanctions granted in the amount of $110,438.97.

F. Length of Trial or Hearing:

Equivalent of 20 minutes

G. Preparation of Reporter's Transcript:

(1) Do you intend to order any portion of the reporter's transcript for the appeal? Yes x No __

(2) Have you filed the transcript designation and ordering form in the district court? Yes __ No x__ to be filed 1/3/92 Have you made arrangements for payment with the court reporter? Yes __ No __ to be on 1/3/92

(3) Estimated date of completion of transcript (if known): __

H. Brief Description of the Nature of the Action and the result below:

In the underlying action, on March 9, 1989, the District Court granted Defendants' motion for attorneys fees under 17 USC Section 505. On January 17, 1991, the Court of Appeals reversed and remanded the March 9, 1989, order, holding that Section 505 did not authorize award of attorneys fees against attorney Gill. On June 28, 1991, Defendants' under the guise of "remand" filed a new motion against attorney Gill only, under Rule 11, 28 USC Section 1927, and Local Rule 27.1. On September 12, 1991, the Court below granted Defendants' motion and awarded sanctions of $110,438.97 (the same amount reversed by the Court of Appeals) and on October 28, 1991, the Court

below denied Gill's Motion for Amendment of Decision and for Aditional [sic] Findings of Fact.

I. Issues to be Raised on Appeal:

1, Whether the District Court abused its discretion by failing to find the additional facts in the record as requested by Appellant Gill;

2. Whether the District Court abused its discretion by awarding attorneys fees under Rule 11 and 28 USC section 1927 two and one-half years after the conclusion of the underlying action;

3. Whether the District Court abused its discretion by awarding attorneys fees against Appellant Gill;

4. Whether the District Court's Conclusion of Law that Gill relied only upon the representations of the author of the motion picture in question is entirely without support in the record of the case;

5, Whether the District Court misunderstood the Order of the Court of Appeal reversing and remanding and failed to apply the law of the case;

6. Whether the District Court is engaged in "fee shifting" prohibited by law;

7. Whether the District Court gave concise but clear reasons for award.

J. Standard of Appellate Review (Specify the proper standard of review to be applied by the court for each issue to be raised, citing relevant authority):

Abuse of discretion generally, as to appropriateness of the sanction imposed;

Clearly erroneous standard as to the facts relied upon by the District Court to establish a violation of Rule 11;

Review *de novo* of the legal conclusion of the District Court that the facts constitute a violation of Rule 11;

Zaldivar v. City of Los Angeles (9th Cir., 1986) 780 F.2d 823, 828

K. Do you believe that settlement is feasible in this case? Yes__ NOx Why or why not?

Appellant Gill believes that the Court's Orders appealed from are without any foundation in the record and constitute a complete abuse of discretion.

L. Would a prebriefing conference be useful in this case? Yes__ NoX Why or why not?

The issues are set forth in the pleadings; the facts are not set forth in the Court's Orders, but the facts are not disputed in the record below.

M. Related Cases: List all related cases pending in this court as defined in Ninth Circuit Rule 28-2.6:

None known to Appellant

N. Attorney(s) Representing Appellee(s)/Respondent(s)

Attorney _____ Telephone_____

Firm _____

Address _____

Client _____

Attorney Edward A. Ruttenberg

Telephone (213) 277-3333

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Address 2049 Century Park East, Suite 3110
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Client Defendants Vidmark, Inc. et al.

Attorney _____ Telephone _____

Firm _____

Address _____

Client _____

(List additional counsel on separate sheet if necessary)

O. Attorney or Appellant (if pro se) Filing Docket Statement

Name William K. Rieber Telephone (310) 454-5770

Firm Law Offices of William K. Rieber

Address 15200 Sunset Boulevard, Suite 208

Pacific Palisades, California 90272

Check one: (x) Attorney
( ) Appellant pro se

/s/ William K. Rieber
Signature

January 2, 1992
Date

If this is a joint statement by multiple appellants, add the names and address of other counsel on an additional

sheet accompanied by a certification that they concur in the filing of this statement

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-56471

HERB NEFT, et al.,

Plaintiffs

and

KEITH H. GILL

Appellant

v.

VIDMARK, INC. et al.,

Defendants-Appellees

ON APPEAL FROM THE DECISION
OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court's Order of attorneys' fees in the sum of $110,438.97 imposed upon an attorney for Plaintiffs, under Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, Local Rule 27.1 and the Court's inherent powers, more than three years after the complaint was filed and two and one-half years after the

conclusion of the underlying action, is an abuse of judicial discretion.

2. Whether the refusal of the District Court to find the requested additional facts in the Record showing that the Complaint was filed "after reasonable inquiry" and that the action was prosecuted in good faith is an abuse of judicial discretion.

3. Whether the district court's conclusion: "In *Neft v. Vidmark*, 923 F.2d 746 (9th Cir. 1991), the Ninth Circuit reversed and remanded for consideration this Court's assessment of costs and attorneys' fees against Mr. Gill." is erroneous.

4. Whether the District Court's findings and conclusions of law that:

(a) "Mr. Gill filed and prosecuted the present action frivolously and in bad faith";

(b) "The Court is convinced that Mr. Gill unreasonably based his entire case upon his discussions with one person, Fred Williamson, plaintiffs' purported licensor, and refused to investigate further.";

(c) "Because Mr. Gill failed to conduct a proper inquiry, the pleadings were not well grounded in fact or warranted by existing law, and needlessly increased the cost of litigation"; and (d) "In this case Mr. Gill continued prosecuting the action after defendants presented him with evidence which had the potential to completely refute the plaintiffs' case, while failing to complete his investigation of the plaintiffs' case after this evidence came to light."; each are entirely without support in the Record of this case and are clearly erroneous.

5. Whether the Memorandum of Decision and Order of the Distrct [sic] Court is an attempted impermissable [sic] "fee shifting".

6. Whether the District Court misunderstood the Decision of the United States Court of Appeals for the Ninth Circuit reversing and remanding the prior Order of the District Court "for reconsideration of defendants' motion for costs and fees", [which motion was brought under 17 U.S.C. § 505, not Rule 11 nor 28 U.S.C. § 1927, and was brought against Plaintiffs only, not against plaintiffs' counsel.]

JURISDICTION

A. *District Court*

The District Court exercised subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338.

B. *Appealability*

The orders appealed are final; this Court exercises jurisdiction pursuant to 28 U.S.C. § 1291. *Reygo Pacific Corp. v. Johnson Pump Co.*, 680 F.2d 647, 648 (9th Cir., 1982).

C. *Timeliness*

The Memorandum of Decision and Order appealed was entered on September 12, 1991. The Minute Order denying the Motions of Keith H. Gill for amendment of findings and for additional findings of fact was entered on October 28, 1991. The Notice of appeal from the Order entered on September 12, 1991, and from the Minute

Order entered on October 28, 1991, was filed on November 14, 1991, and therefore was timely under

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